

No. 10,000

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

RUDOLPH LENSCH and PAUL LEDER,

Appellants,

vs.

METALLIZING COMPANY OF AMERICA, a corporation, L.

E. KUNKLER, CHARLES BOYDEN and JOSEPH GOSSNER,

Appellees.

PETITION FOR REHEARING.

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TABLE OF AUTHORITIES CITED.

	PAGE
Eibel Process Co. v. Minnesota and Ontario Paper Co., 261 U. S. 45, 67 L. Ed. 523.....	2, 4
Emmett v. Metals Processing Corporation, 9 Cir., 118 Fed. (2d) 796	1
Krementz, George, v. The S. Cottle Co., 148 U. S. 556, 37 L. Ed. 558	4
Kurtz v. Belle Hat Lining Co., 2 Cir., 280 Fed. 277.....	4
Steiner Sales Co. v. Schwartz Sales Co., 10 Cir., 98 Fed. (2d) 999	4
Webster Loom Co. v. Higgins, 105 U. S. 580, 26 L. Ed. 1177....	4

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*To the Honorable United States Circuit Court of Appeals
for the Ninth Circuit:*

Your petitioners, appellants in this cause, respectfully petition this Honorable Court under Rule 25 for a rehearing of the appeal hereon decided June 3, 1942.

The grounds upon which rehearing is sought are as follows:

1. The opinion of the Court refers to an unrelated case, *Emmett v. Metals Processing Corporation*, 9 Cir., 118 Fed. (2d) 796, wherein it was held that a patent there in suit relating to a feature of metal spraying was invalid, and this Court apparently therefrom links welding and metal spraying as a common art of considerable antiquity. Weld-

ing is the joining by fusion of two similar metals. Metal spraying is not comparable to welding. Metal spraying is the melting and atomizing of metal and driving the metal particles with considerable velocity onto a prepared but not preheated surface of metal, stone, wood, fiber, or other substances. The record would indicate that this process was not known prior to about 1915.

2. The Court gave an effect to the Morf patent No. 1,128,175 issued February 9, 1915, beyond that to which it is entitled under law established by the United States Supreme Court. In holding the Lensch and Leder patent invalid, this Court said in its opinion:

“Appellant’s patent shows no discovery in the art which had not been disclosed by Morf, that is, the melting of a rod by a flame and the blowing of the molten metal by compressed air.”

The Morf patent disclosed and claimed a *method* or *process*. It did not show a complete spray gun nor the parts therefor. The effect of this Court’s reference herein quoted is to bar from patent protection an improved device or machine for carrying out a previously known process, which we respectfully say, is contrary to *Eibel Process Co. v. Minnesota and Ontario Paper Co.*, 261 U. S. 45, 67 L. Ed. 523, wherein the Supreme Court found invention present in an improvement in a paper making machine which differed only to the extent that it speeded up production and produced a more uniform sheet of paper, otherwise following the old process. Appellant’s

patented spray gun by reason of the construction defined in the claims is able to operate at a much higher rate of speed than previous guns, and the Mogul gun of appellees which is a copy of the patented gun achieves the same advantage. At page 128 of the transcript of record Mr. Charles Boyden, vice president of Metallizing Company of America, appellee, testified as follows:

“Q. Do you get better and more satisfactory results by the Mogul than you do with the metallizer?

A. It is faster.

Q. What do you mean by that? A. It sprays more metal in a given time.

Q. Is that the only advantage? A. That is a sufficient advantage.”

3. In holding that it was not invention for appellants to change the shape or form of the housing, or to make one housing into two, this Court apparently relied upon the general rule applicable where no new result is seen. There are exceptions to this rule, where speed of operation, efficiency and safety are achieved, which exceptions we respectfully submit, should have been considered by this Court in the light of the fact that the patented spray gun has increased speed of operation, efficiency and safety.

The British patent No. 268,431 referred to in the opinion of the Court has two housings completely separated and remote from each other, the power from the turbine being conveyed through a flexible shaft to the wire feeding mechanism. The U. S. patent No. 1,917,523 referred

to in the opinion of the Court illustrates a box type single housing. Neither of the disclosures suggests a modification of the other which would result in the form of housing specified in appellants' patent. Neither of these prior patents have an open channel between two housings providing for dissipation of gases outside of the housings, which is one of the primary structural features enabling the patented gun and the Mogul gun to operate much faster than the guns of the prior art. As seen from the physical exhibits, the patented gun and the Mogul gun will operate with a relatively large wire (.125 of an inch) whereas the prior art guns such for example as the physical embodiment of the old French gun would accommodate only about .040 to possibly .060 or .070 inch. The difference in diameter results in a substantial difference in volume of metal sprayed.

Such results, though involving slight changes in form, have uniformly been held by the United States Supreme Court to be evidence of invention.

Eibel Process Co. v. Minnesota and Ontario Paper Co., supra;

George Krementz v. The S. Cottle Co., 148 U. S. 556, 37 L. Ed. 558;

Webster Loom Co. v. Higgins, 105 U. S. 580, 26 L. Ed. 1177.

4. The Court in its opinion did not accord the Lensch and Leder patent the support which is given to the presumption of validity by the fact that the accused Mogul gun is a copy of the patented gun. (See *Steiner Sales Co. v. Schwartz Sales Co.*, 10 Cir., 98 Fed. (2d) 999, 1003 (point 4), citing *Kurtz v. Belle Hat Lining Co.*, 2 Cir., 280 Fed. 277.)

5. The Court in its opinion made no reference to appellants' request for a special allowance for costs incurred in printing the unnecessary parts of the record pursuant to appellees' designation for reasons set forth in appellants' opening brief, page 11, and prayer in the conclusion, page 39. It was contended by appellants that appellees required the printing of a large amount of testimony unnecessary to a consideration of the points on appeal and that a special allowance of costs should be made in favor of appellants therefor.

Respectfully submitted,

RUDOLPH LENSCH and

PAUL LEDER,

Petitioners and Appellants,

By HERBERT A. HUEBNER,

Attorney for Petitioners and Appellants.

Los Angeles, California.

July 1, 1942.

Certificate of Counsel.

The undersigned counsel certifies that in his judgment this petition for rehearing is well founded and that it is not interposed for delay.

HERBERT A. HUEBNER,

Counsel for Petitioners and Appellants.

